Supreme Court U.S.
FILED
MAY 18 2010
OFFICE OF THE CLERK

No. 09-1127

IN THE

Supreme Court of the United States

RR, by his next friend ER,

Petitioner,

v.

EL PASO INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JOE R. TANGUMA II
Counsel of Record
ELENA M. GALLEGOS
WALSH, ANDERSON, BROWN,
GALLEGOS & GREEN, P.C.
P.O. Box 168046
Irving, Texas 75016
(214) 574-8800
jtanguma@irv.wabsa.com
Attorneys for Respondent

229091

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Supreme Court should review a denial of attorneys' fees to R.R. who was held to have received no more relief than offered by EPISD and also determined to have engaged in unreasonable protraction by refusing to accept EPISD's settlement offers of full educational relief and reasonable attorneys' fees in favor of "absolutely needless" litigation.

2. Whether the IDEA permits R.R. to refuse all offers of full educational relief and reasonable attorneys' fees, withhold parental consent for the evaluation of the child he requested as relief, and delay resolution and delivery of requested educational services to the child in favor of "absolutely needless" litigation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	4
I. THE FIFTH CIRCUIT'S DECISION DOES NOT DENY PARENTS ANY RIGHTS THEY ARE AFFORDED UNDER THE IDEA.	4
A. R.R. predicates the majority of his petition on policy arguments that are irrelevant.	4
B. The IDEA does not grant an absolute right to attorneys' fees.	5
C. R.R.'s argument that he was justified to pursue a consent decree is legally erroneous and does not justify Supreme Court review.	15

Contents

Page

D. There is no legally cognizable interest to pursue attorneys' fees. 16

E. R.R.'s argument, if accepted, would violate the Spending Clause. 18

II. THE FIFTH CIRCUIT WAS NOT WRONG IN FINDING THAT R.R. ENGAGED IN UNREASONABLE PROTRACTION AND RECEIVED NO MORE RELIEF THAN OFFERED BY EPISD. 21

III. THE FIFTH CIRCUIT WAS NOT WRONG TO DETERMINE THAT R.R. WAS NOT SUBSTANTIALLY JUSTIFIED IN REJECTING EPISD'S SETTLEMENT OFFERS BASED ON ENFORCEABILITY CONCERNS. 23

A. The IDEA directly allows enforcement of settlement agreements in state or federal court. 23

B. The Supremacy Clause does not permit state law to trump the IDEA. 26

Contents

Page

C. It is not even settled under Texas law that EPISD would be immune from a breach of contract action arising from an alleged breach of a settlement reached under the IDEA. 31

IV. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE IDEA'S PURPOSES. 33

CONCLUSION 37

TABLE OF AUTHORITIES

Page

Cases

Adickes v. S.H. Kress & Co.,
398 U.S. 144, 90 S.Ct. 1598 (1970) 15

Alegria v. Dist. of Columbia,
391 F.3d 262 (D.C. Cir. 2004) 13

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240, 95 S.Ct. 1612 (1975) 7

Ardestani v. Immigration and Naturalization Service,
502 U.S. 129, 112 S.Ct. 515 (1991) 18

A.R. ex. rel. R.V. v. N.Y. City Dep't. of Educ.,
407 F.3d 65 (2nd Cir. 2005) 17

Arlington Cent. Sch. Dist. v. Murphy,
548 U.S. 291, 126 S.Ct. 2455 (2006) 18, 19

Bd. of Trustees of Univ. of Ala. v. Garrett,
531 U.S. 356, 121 S.Ct. 955 (2001) 26

Beck v. Prupis,
529 U.S. 494, 120 S.Ct. 1608 (2000) 8

Berenyi v. District Director, Immigration and Naturalization Service,
385 U.S. 630, 87 S.Ct. 666 (1967) 22

Authorities

Page

Bingham v. New Berlin Sch. Dist.,
550 F.3d 601 (7th Cir. 2008) 12

Boehms v. Crowell,
139 F.3d 452 (5th Cir. 1998) 18

Buckhannon Bd. and Care Home v. West Virginia Dep't. of Health and Human Res.,
532 U.S. 598, 121 S.Ct. 1835 (2001) ..... *passim*

Cary v. Curtis,
44 U.S. 236 (1845) 6

Christina A. ex. rel. Jennifer A. v. Bloomberg,
315 F.3d 990 (8th Cir. 2003) 15, 16, 23

City of Houston v. Jones,
197 S.W.3d 391 (Tex. 2006) 32

Claflin v. Houseman,
93 U.S. 130 (1876) 28

Cooper Industries, Inc. v. Aviall Services, Inc.,
543 U.S. 157, 125 S.Ct. 577 (2004) 24

Demarest v. Manspeaker,
498 U.S. 184, 111 S.Ct. 599 (1991) 7

Doe v. Bd. of Educ.,
165 F.3d 260 (4th Cir. 1998) 17

Authorities

Page

Doe v. Boston Pub. Schools,
358 F.3d 20 (1st Cir. 2004) 13

Ellis v. Dixon,
349 U.S. 458, 75 S.Ct. 850 (1955) 15, 21

El Paso Indep. Sch. Dist. v. Richard R.,
591 F.3d 417 (5th Cir. 2009) 13

Evans v. Jeff D.,
475 U.S. 717, 106 S.Ct. 1531 (1986) 14

Fed. Communication Comm'n v. Fox Television Stations, Inc.,
__ U.S. __, 129 S.Ct. 1800 (2009) 15

Fitzpatrick v. Bitzer,
427 U.S. 445, 96 S.Ct. 2666 (1976) 26

Forest Grove. Dist. v. T.A.,
__ U.S. __, 129 S.Ct. 2484 (2009) 8

Freytag v. Commissioner of Internal Revenue,
501 U.S. 868, 111 S.Ct. 2631 (1991) 6

General Talking Pictures Corp. v. Western Elec. Co.,
304 U.S. 175, 58 S.Ct. 849 (1938) 23

G ex rel. RG v. Fort Bragg Dependent Sch.,
343 F.3d 295 (4th Cir. 2003) 13

Authorities

Page

Great Northern Life Ins. Co. v. Read,
322 U.S. 47, 64 S.Ct. 873 (1944) 28

Haywood v. Drown,
__ U.S. __, 129 S.Ct. 2108 (2009) 28, 29, 30

Howlett v. Rose,
496 U.S. 356, 110 S.Ct. 2430 (1990) 29, 30

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261, 117 S.Ct. 2028 (1997) 27

J.C. v. Reg'l Sch. Dist. 10,
278 F.3d 119 (2d Cir. 2002) 12

John T. ex rel. Paul T. v. Delaware County Intermediate Unit,
318 F.3d 545 (3d Cir. 2003) 12, 13

Key Tronic Corp. v. United States,
511 U.S. 809, 114 S.Ct. 1960 (1994) 7

Lehman v. Nakshian,
453 U.S. 156, 101 S.Ct. 2698 (1981) 18

Lewis v. Cont'l. Bank Corp.,
494 U.S. 472, 110 S.Ct. 1249 (1990) 17

Miles v. Apex Marine Corp.,
498 U.S. 19, 111 S.Ct. 317 1990) 8

Authorities

Page

Minneapolis & St. Louis R. Co. v. Bombolis,
241 U.S. 211, 36 S.Ct. 595 (1916) 29

Mission Consol. Indep. Sch. Dist. v. Garcia,
253 S.W.3d 653 (Tex. 2008) 25, 31

Mondou v. New York, N.H. & H.R. Co.,
223 U.S. 1, 32 S.Ct. 169 (1912) 30

N.B. v. Alachua Cty. Sch. Bd.,
84 F.3d 1376 (11th Cir. 1996) 35

Nevada Dep't of Human Resources v. Hibbs,
538 U.S. 721, 123 S.Ct. 1972 (2003) 25

Owen v. Independence,
445 U.S. 622, 100 S.Ct. 1398 (1980) 30

Patsy v. Board of Regents of Fla.,
457 U.S. 496, 102 S.Ct. 2557 (1982) 29

P.N. v. Seattle Sch. Dist. No. 1,
474 F.3d 1165 (9th Cir. 2007) 13

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477, 109 S.Ct. 1917 (1989) 16

Rogers v. Lodge,
458 U.S. 613, 102 S.Ct. 3272 (1982) 15

Authorities

Page

Ross v. Moffitt,
417 U.S. 600, 94 S.Ct. 2437 (1974) 22

Schaffer v. Weast,
546 U.S. 49, 126 S.Ct. 528 (2005) 18, 33

Seminole Tribe of Florida v. Florida,
517 U.S. 44, 116 S.Ct. 1114 (1996) 26

Smith v. Fitchburg Pub. Sch.,
401 F.3d 16 (1st Cir. 2005) 12

South Dakota v. Dole,
483 U.S. 203, 107 S.Ct. 2793 (1987) 28

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329, 118 S.Ct. 789 (1998) 28

Southern Power Co. v. North Carolina Pub. Servs. Co.,
263 U.S. 508, 44 S.Ct. 164 (1924) 23

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83, 118 S.Ct. 1003 (1998) 17

T.D. v. LaGrange Sch. Dist. No. 102,
349 F.3d 469 (7th Cir. 2003) 13

Testa v. Katt,
330 U.S. 386, 67 S.Ct. 810 (1947) 31

Authorities

Page

Texas A&M Univ.-Kingsville v. Lawson,
87 S.W.3d 518 (Tex. 2002) 31, 32

Tooke v. City of Mexia,
197 S.W.3d 325 (Tex. 2006) 25, 31

Urban v. Jefferson Cty. Sch. Dist. R-1,
89 F.3d 720 (10th Cir. 1996) 35

Constitution

U.S. CONST., ART. I, §8, CL. 1 18

U.S. CONST. ART. VI 29

Statutes

5 U.S.C. § 5596(b)(1)(A)(ii) 10

7 U.S.C. § 1507(c) 10

12 U.S.C. § 1464(q)(3) 10

12 U.S.C. § 1786(p) 11

12 U.S.C. § 1818(n) 11

12 U.S.C. § 1975 10

12 U.S.C. § 2273 11

Authorities

	Page
12 U.S.C. § 3108(b)(5)	11
12 U.S.C. § 4907	10
15 U.S.C. § 15(a)	10
15 U.S.C. § 78i(e)	11
15 U.S.C. § 298(b)	10
15 U.S.C. § 1640(a)	10
15 U.S.C. § 1693m(a)	10
15 U.S.C. § 2073	11
15 U.S.C. § 2102	11
15 U.S.C. § 2622(b)(2)(B)	10
15 U.S.C. § 7706(g)(4)	11
16 U.S.C. § 1540(g)(4)	11
16 U.S.C. § 2632(a)	10
16 U.S.C. § 4307(c)	10
18 U.S.C. § 1031(h)	11

Authorities

	Page
18 U.S.C. § 1964(c)	11
18 U.S.C. § 2255(a)	11
18 U.S.C. § 2259(b)	11
18 U.S.C. § 2333(a)	11
20 U.S.C. § 1400	25
20 U.S.C. § 1400(c)(8)	33
20 U.S.C. § 1403	28
20 U.S.C. § 1415(c)	33, 34
20 U.S.C. § 1415(c)(2)(A)	34
20 U.S.C. § 1415(c)(2)(B)	34
20 U.S.C. § 1415(c)(2)(E)	34
20 U.S.C. § 1415(d)	33, 34
20 U.S.C. § 1415(e)	33, 34
20 U.S.C. § 1415(f)	33, 34
20 U.S.C. § 1415(f)(1)(A)	34

Authorities

Page

20 U.S.C. § 1415(f)(1)(B)(i) 34

20 U.S.C. § 1415(f)(1)(B)(ii) 34

20 U.S.C. § 1415(f)(1)(B)(iii) 2, 24, 25

20 U.S.C. § 1415(f)(1)(B)(iii)(II) 3, 25, 29

20 U.S.C. § 1415(f)(1)(B)(iv) 34

20 U.S.C. § 1415(i)(3)(B) 7, 19

20 U.S.C. § 1415(i)(3)(B)(i) 36

20 U.S.C. § 1415(i)(3)(B)(i)(I) 7, 11

20 U.S.C. § 1415(i)(3)(B)(i)(II) 12, 14, 36

20 U.S.C. § 1415(i)(3)(B)(i)(III) 12, 14

20 U.S.C. § 1415(i)(3)(D) 1, 13, 20, 33, 36

20 U.S.C. § 1415(i)(3)(F) 1, 13, 20, 33

20 U.S.C. § 1415(i)(3)(F)(i) 22, 36

20 U.S.C. § 1415(i)(3)(G) 33

29 U.S.C. § 216(b) 11

Authorities

	Page
29 U.S.C. § 626(b)	11
29 U.S.C. § 2617(a)(3)	11
30 U.S.C. § 1270(d)	11
30 U.S.C. § 1427(c)	11
42 U.S.C. § 300j-8(d)	11
42 U.S.C. § 4911(d)	11
42 U.S.C. § 7604(d)	11
Rules/Regulations	
34 C.F.R. § 300.510(a)(2)	34
U.S. SUP. CT. R. 10	22
U.S. SUP. CT. R. 17.1	32
U.S. SUP. CT. R. 19(1)(b)	32

Page

Miscellaneous

S. 3161 107th Cong. (2002) 10

148 Cong. Rec. S11080-01, S11081 10

150 Cong. Rec. S5250-02 14

151 Cong. Rec. S12950-02 9

153 Cong. Rec. S15701-04 8

153 Cong. Rec. S15830-01 8

S. REP. No. 108-185 (2003) 35

The Federalist No. 82, p. 132 (E. Bourne ed. 1947) (A. Hamilton) 28

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner R.R. ("R.R.") misleads the Court by failing to completely identify the statutory provisions relied upon by the Fifth Circuit as the basis for reversing the district court's award of attorneys' fees and denying him any award of attorneys' fees under the Individuals with Disabilities Education Act (IDEA). The Fifth Circuit did not limit its reversal of the district court's fee award to an application of 20 U.S.C. § 1415(i)(3)(D) alone. The Fifth Circuit also applied 20 U.S.C. § 1415(i)(3)(F) as the basis for vacating the fee award, which provides:

> (F) Reduction in amount of attorneys' fees
>
> Except as provided in subparagraph (G), whenever the court finds that–
>
> (i) the parents, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
>
> (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
>
> (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

> (iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A) of this section, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

In addition, R.R. erroneously claims that EPISD's settlement offers, if accepted, would not have been enforceable, but completely fails to acknowledge that the Fifth Circuit held otherwise based on 20 U.S.C. § 1415(f)(1)(B)(iii), which provides:

> (iii) Written settlement agreement
>
> In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is–
>
> (I) signed by both the parent and a representative of the agency who has authority to bind such agency; and
>
> (II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

STATEMENT OF THE CASE

R.R.'s "Statement" is both misleading and inaccurate, as shown in greater detail below. (Pet. 3-8). The Respondent School District ("EPISD") adopts by reference the Factual Background and Procedural History as stated by the Fifth Circuit. (Pet. 2a-6a). This case arises under the Individuals with Disabilities Education Act (IDEA) and involves whether R.R. is entitled to an award of attorneys' fees. The district court determined that R.R. was the prevailing party in his suit against EPISD because he had won a judicial order granting him his requested relief and awarded him attorneys' fees in the amount of $45,804. (Pet. 2a). The Fifth Circuit noted that because it was "undisputed that R.R. did not achieve any educational benefits beyond what EPISD offered, the question is whether R.R. was substantially justified in rejecting EPISD's settlement offer." (Pet. 16a). The district court determined that EPISD's settlement offer would not have been enforceable in either federal or state court such that R.R. had an interest in continuing litigation to obtain an enforceable order of relief. (Pet. 17a). The Fifth Circuit disagreed and determined that under 20 U.S.C. § 1415(f)(1)(B)(iii)(II) a settlement agreement reached at the resolution meeting would have been enforceable in federal court. (Pet. 17a). The Fifth Circuit concluded that if R.R. had accepted EPISD's offer at the resolution meeting, he could have enforced the resulting settlement agreement in federal court leaving no need for R.R. to reject EPISD's settlement offer and continue litigation solely to obtain an "enforceable" order of relief. (Pet. 20a).

The Fifth Circuit assumed without deciding, that R.R. was the prevailing party in this litigation, but held "because he rejected a written settlement offer that included all the educational relief that he requested and reasonable attorneys' fees, we also conclude that R.R. unreasonably protracted the resolution of this dispute and VACATE the award of attorneys' fees to R.R." (Pet. 2a).

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION DOES NOT DENY PARENTS ANY RIGHTS THEY ARE AFFORDED UNDER THE IDEA.

A. R.R. predicates the majority of his petition on policy arguments that are irrelevant.

R.R. argues that he is entitled to attorneys' fees under the IDEA, expending most of his brief complaining about the demise of the catalyst theory under *Buckhannon Bd. and Care Home v. West Virginia Dep't. of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835 (2001), and what he alleges are the unintended consequences of its application in the IDEA context. R.R.'s argument is completely misplaced and misrepresents the facts in this case and the Fifth Circuit's holding. The Fifth Circuit did not rely upon *Buckhannon* as the basis for denying his attorneys' fees under the IDEA. (Pet. 1a-28a). To the contrary, the Fifth Circuit assumed, without deciding, that R.R. was a prevailing party. (Pet. 14a). R.R. also fails to acknowledge that EPISD did not refuse to pay attorneys' fees. EPISD *offered* R.R. attorneys' fees,

initially in the amount of $3,000.00, and further requested a fee demand, asking R.R. to provide it "with the amount of attorney's fees that w[ould] be necessary to finalize the settlement." (Pet. 4a-5a). Any "entitlement" to attorneys' fees that R.R. believes he rightfully held under the IDEA would have therefore been satisfied had he simply stated the amount that it would take to finalize the settlement. R.R. did not do this, instead choosing to proceed when there was "absolutely no need to continue litigating." (Pet. 5a, 24a). The predicament that R.R. rails against as being created by *Buckhannon* simply is not present in the case at bar; rather, it is one of his own obstinate making.

B. The IDEA does not grant an absolute right to attorneys' fees.

Even if the Fifth Circuit had relied on *Buckhannon* to deny a fee award to R.R., a grant of certiorari would not be appropriate. R.R.'s argument that he has a "right" to attorneys' fees is nothing more than a request that the catalyst theory be revived, notwithstanding the plain language of the IDEA. However, the policy arguments that R.R. raises today in support of his request that the catalyst theory be revived are the same ones articulated before the Supreme Court in 2001 when it decided *Buckhannon*. The Supreme Court declined to preside over the policy arguments then, acknowledging that it was within Congress' purview, and not its own, to review the type of policy arguments which R.R. also seeks to advance in this case, stating:

> Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not

> determine which way these various policy arguments cut. In *Aleyska*, 421 U.S. at 260, 95 S.Ct. 1612, we said that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority." *Buckhannon*, 532 U.S. at 610, 121 S.Ct. at 1843.

The Supreme Court's recognition of its limited authority is long established. In 1845, the Supreme Court acknowledged that judicial power was dependent upon the action of Congress, stating:

> To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. *Cary v. Curtis*, 44 U.S. 236, 245 (1845).

The Supreme Court therefore instructs that courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873-74, 111 S.Ct. 2631, 2636 (1991).

Buckhannon is not only well-settled law, but also adopted by Congress into the IDEA's statutory provisions, which require a parent to be a "prevailing party," as an element for fee eligibility. 20 U.S.C. § 1415(i)(3)(B)(i)(I). Since Congress has predicated a parent's eligibility for a fee award on "prevailing party" status under the IDEA, it is clearly left to Congress alone to give consideration to the policy arguments R.R. asserts here. The IDEA does not impart the judiciary with this authority.

Under the American Rule, courts follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960 (1994); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612 (1975). When the terms of a statute are unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 604 (1991). The IDEA unambiguously establishes that a party is not granted an inherent right to attorneys' fees; indeed, they are not even eligible for attorneys' fees unless they are a prevailing party.

By the plain terms of the IDEA, Congress chose to predicate eligibility for attorneys' fees to only those parents deemed a "prevailing party." 20 U.S.C. § 1415(i)(3)(B). "The term 'prevailing party' [is] a legal term of art." *Buckhannon*, 532 U.S. at 603, 121 S.Ct. at 1838. In *Buckhannon*, the Supreme Court held that the catalyst theory was dead, stating the term "prevailing party" did not extend to a party that did not secure a judgment on the merits or a court-ordered consent

decree, yet achieved a desired result simply because the lawsuit brought about a voluntary change in the defendant's conduct. *Buckhannon*, 532 U.S. at 600, 121 S.Ct. at 1838.

The Supreme Court assumes that Congress is aware of existing law when it passes legislation. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351, 118 S.Ct. 789, 802 (1998); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325 (1990). Congress is also presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Forest Grove. Dist. v. T.A.*, __ U.S. __, 129 S.Ct. 2484, 2492 (2009). When Congress uses language with a settled legal meaning, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 529 U.S. 494, 500-01, 120 S.Ct. 1608, 1613-14 (2000).

Congress also knows how to avoid the dictates of *Buckhannon*, having done so in other contexts. For example, following *Buckhannon*, Congress introduced legislation to specifically confirm that its holding did not apply to Freedom of Information Act cases. 153 Cong. Rec. S15830-01, S15831 (Senator Leahy, "the bill also clarifies that the Supreme Court's decision in *Buckhannon* . . . which eliminated the 'catalyst theory' for attorneys' fees recovery under certain Federal civil rights laws, does not apply to FOIA cases."); *see also* 153 Cong. Rec. S15701-04, S15704 (same); 153 Cong. Rec. S14849-01, S14853 (same); 153 Cong. Rec. S10986-

02, S10987 (same). The legislation introduced by Senator Leahy called for an amendment to the FOIA statute providing:

> For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either–(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial. 153 Cong. Rec. S15701-04, S15702 (amending 5 U.S.C. § 552(a)(4)(E) by adding subsection (ii)).

Congress similarly introduced legislation to deny application of *Buckhannon* in cases brought under the Equal Access to Justice Act. 151 Cong. Rec. S12950-02, S12951 (Senator Feingold statements regarding introduction of Senate Bill 2017). The legislation introduced by Senator Feingold called for an amendment that stated:

> For the purposes of this section, the term 'prevailing party includes, in addition to a party who prevails through a judicial or administrative judgment or order, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought. 151 Cong. Rec. S12950-02,

S12953 (seeking to amending 28 U.S.C. § 2412 by adding subsection (g)).

This bill was ultimately referred to the Committee on Judiciary, with no further action taken upon it.

Senator Feingold also introduced a bill, the Settlement Encouragement and Fairness Act of 2002, that would have provided a new definition of "prevailing party" for *all* Federal fee-shifting statutes, thereby reversing *Buckhannon* and restoring the catalyst theory. 148 Cong. Rec. S11080-01, S11081; S. 3161 107th Cong. (2002). Congress did not pass this bill; it was ultimately referred to the Committee on Judiciary, with no further action taken upon it.

If an automatic and absolute right to attorneys' fees arose at the mere onset of an alleged violation of the IDEA, without regard to any resolution efforts of the school, Congress could have easily chosen mandatory fee-shifting language over the language it ultimately adopted in the IDEA. Congress knows how to make a fee award mandatory upon a finding of a violation of law.[1]

1. *See* Truth in Lending Act, 15 U.S.C. § 1640(a); Civil Service Reform Act of 1978, 5 U.S.C. § 5596(b)(1)(A)(ii); Federal Crop Insurance Act, 7 U.S.C. § 1507(c); Homeowner's Loan Act, 12 U.S.C. § 1464(q)(3); Bank Tying Act, 12 U.S.C. § 1975; Homeowner's Protection Act of 1988, 12 U.S.C. § 4907; Clayton Act, 15 U.S.C. § 15(a); Jeweler's Liability Act, 15 U.S.C. § 298(b); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a); Toxic Substances Control Act, 15 U.S.C. § 2622(b)(2)(B); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a); Federal Cave Resources Protection Act of 1988, 16 U.S.C. § 4307(c); (Cont'd)

Congress also knows how to permit an award of fees to a party without imposing success or prevailing party status as a prerequisite element.[2]

Following *Buckhannon*, Congress re-authorized and amended the IDEA in 2004. Notwithstanding the options it had to expressly avoid *Buckhannon* if it so chose, Congress did not eliminate or modify the element of "prevailing party" status as a requirement for a parent's eligibility for an award of attorneys' fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I). Significantly, Congress did amend the IDEA in 2004 to allow school districts the ability to recover attorneys' fees either against a

---

(Cont'd)
Major Fraud Act of 1988, 18 U.S.C. § 1031(h); Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c); Child Abuse Victims' Rights Act of 1986, 18 U.S.C. § 2255(a); Safe Streets for Women Act of 1994, 18 U.S.C. § 2259(b); Antiterrorism Act of 1990, 18 U.S.C. § 2333(a); Fair Labor Standards Act, 29 U.S.C. § 216(b); Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(b); Family and Medical Leave Act of 1993, 29 U.S.C. § 2617(a)(3).

2. *See* Federal Credit Union Act, 12 U.S.C. § 1786(p); Federal Deposit Insurance Act, 12 U.S.C. § 1818(n); Farm Credit Amendments Act of 1985, 12 U.S.C. § 2273; International Banking Act of 1978, 12 U.S. § 3108(b)(5); Securities Exchange Act of 1934, 15 U.S.C. § 78i(e); Consumer Product Safety Act, 15 U.S.C. § 2073; Hobby Protection Act, 15 U.S.C. § 2102; CAN-SPAM Act of 2003, 15 U.S.C. § 7706(g)(4); Endangered Species Act, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Clean Air Act, 42 U.S.C. § 7604(d).

parent's attorney as a "prevailing party" or against a parent or parent's attorney if "prevailing." 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). These amendments disprove R.R.'s theory that a parent has an inherent right to fees; indeed, a parent's attorney that brings an action that may initially have merit can even be ordered to pay a school district's attorneys' fees if he or she *continues* to litigate *after* the litigation became frivolous, unreasonable or without foundation. 20 U.S.C. § 1415(i)(3)(B)(i)(II).

Thus, if Congress wanted to lessen the standard for parents to receive a fee award under the IDEA, they could have easily modified the statutory language by either making the fee award mandatory, or eliminating any requirement of prevailing party status or success as an element. That Congress did not exercise this authority bars any judicial consideration of R.R.'s request that he be permitted to circumvent *Buckhannon*.

Additionally, none of the Circuit Courts that have considered *Buckhannon* have refused to apply it in the IDEA context or otherwise been persuaded by the concerns R.R. raises here. *See Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 603 (7th Cir. 2008) (discussing the various circuit court's application of *Buckhannon* in the IDEA context and dismissing the policy arguments offered by the parent). In fact, each Circuit Court that has addressed *Buckhannon* in the IDEA context, including the Fifth Circuit in this case, has applied it directly. *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 22 (1st Cir. 2005); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002); *John T. ex rel. Paul T. v.*

Delaware County Intermediate Unit, 318 F.3d 545, 556 (3d Cir. 2003); *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 310 (4th Cir. 2003); *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417, 430 (5th Cir. 2009); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 477 (7th Cir. 2003); *John T. ex rel. Robert T. v. Iowa Dept. of Educ.*, 258 F.3d 860, 863-64 (8th Cir. 2001); *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1167 (9th Cir. 2007); *Alegria v. Dist. of Columbia*, 391 F.3d 262, 263 (D.C. Cir. 2004). Accordingly, although the IDEA guarantees the right to a free appropriate public education, it "does not explicitly guarantee the right to attorney's fees incurred in pursuit of that education." *Richard R.*, 590 F.3d at 430; *Alegria*, 391 F.3d at 266; *Doe v. Boston Pub. Schools*, 358 F.3d 20, 29 (1st Cir. 2004); *T.D.*, 349 F.3d at 477.

The "prevailing party" language adopted by Congress under the IDEA is not the only definitive evidence that Congress did not create an inherent right to fees as R.R. argues. Congress did not impart a hearing officer with jurisdiction to award fees, and further chose to leave any award of attorneys' fees to a prevailing party subject to the *discretion* of the court. 20 U.S.C. § 1415(i)(3)(B)(i). The IDEA's fee reduction and fee prohibition provisions further belie R.R.'s argument here. 20 U.S.C. §§ 1415(i)(3)(D), (F).

That Congress intended to prohibit a parent or their attorney from nakedly pursuing fees is demonstrated by the aforementioned IDEA 2004 amendments, allowing a school district the ability to recoup its fees from a parent or parent's attorney. As Senator Grassley

stated during the enactment of the Gregg Amendment, 20 U.S.C. § 1415(i)(3)(B)(i),(II),(III):

> When a school district must spend money to defend against frivolous cases, it drains funds away from needed services for other disabled children. This amendment also protects parents from unscrupulous attorneys who would prey on parents when they are most vulnerable by encouraging them to litigate or prolong litigation in order to collect fees. The law should protect children, not the pockets of trial lawyers. 150 Cong. Rec. S5250-02, S5349.

R.R.'s citation to *Evans v. Jeff D.*, 475 U.S. 717, 106 S.Ct. 1531 (1986) is also misplaced and irrelevant to whether an interest in attorneys' fees can be pursued under the IDEA. *Evans* is a pre-*Buckhannon* decision, and does not even discuss the meaning of "prevailing party." In fact, R.R. fails to inform the Court that *Evans* actually negates his argument. In *Evans*, the Supreme Court held there that the underlying statute, Section 1988, did not prohibit settlements that were conditioned on the waiver of fees in order to be faithful to the purposes of the statute. *Evans*, 475 U.S. at 738, 106 S.Ct. at 1543. The Supreme Court further stated in *Evans* that the issue of whether fee waivers should be prohibited under Section 1988 was a question best left for Congress. *Evans*, 475 U.S. at 741, 106 S.Ct. at 1545.

C. R.R.'s argument that he was justified to pursue a consent decree is legally erroneous and does not justify Supreme Court review.

R.R.'s citation to *Christina A. ex. rel. Jennifer A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003) for the proposition that he was entitled to pursue a consent decree to gain prevailing party status is misplaced and illogical. As an initial matter, R.R. did not cite to *Christina A.* or raise the issues he alleges it stands for before the Fifth Circuit. The Supreme Court is a court of final review, not first view. *Fed. Communication Comm'n v. Fox Television Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1819 (2009) (holding that when the Circuit Court did not rule on the constitutionality of the Commission's orders, the Court would not entertain a request by the respondents to decide their constitutional validity). When a question or issue is not raised below, it is not open for consideration in proceeding on petition for certiorari. *Ellis v. Dixon*, 349 U.S. 458, 460, 75 S.Ct. 850, 852 (1955). By failing to raise this issue below, R.R. deprived the Fifth Circuit of the opportunity to even consider and address *Christina A.* (Pet. 1a-28a). This contention is therefore inappropriate for consideration now since the Supreme Court does not consider contentions that are not raised before a court of appeals and consequently not addressed by that court. *Rogers v. Lodge*, 458 U.S. 613, 628, 102 S.Ct. 3272, 3281 (1982); citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, 90 S.Ct. 1598, 1602 (1970).

Regardless, even if this issue was not waived, the Eighth Circuit in *Christina A.* did not state that the parent had a right to fees or was otherwise entitled to

pursue litigation to attain prevailing party status. The Eighth Circuit in *Christina A.* did not hold that the parent was entitled to pursue a consent decree to attain prevailing party status. The Eighth Circuit did not hold that the parent was entitled to pursue an interest in enforcement by contempt. Rather, *Christina A.* stands for the narrow proposition that a class action settlement agreement entered into by the parties, and approved by the district court, did not convey prevailing party status. *Christina A.*, 315 F.3d at 993. This decision directly followed the reasoning provided in *Buckhannon.* Nothing within this decision imparts a statutory right to circumvent *Buckhannon.* However, even assuming, *arguendo*, that *Christina A.* did stand for the misstated propositions offered by R.R., it would only signal the Eighth Circuit's error in impermissibly deviating away from the binding precedent set forth in *Buckhannon. See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917 (1989) (stating "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts.").

D. There is no legally cognizable interest to pursue attorneys' fees.

R.R.'s argument that he is justified to pursue litigation for his fees, despite an offer of full educational relief, is inconsistent with Supreme Court precedent. In fact, this argument was not even accepted by the district court, which stated that the preclusion of prevailing party status and attorneys' fees to R.R., standing alone, could not serve to maintain a live case or controversy between the parties. (Pet. 63a). A party's

interest in recouping attorneys' fees is not even recognized by the Supreme Court as a legally cognizable interest that would permit litigation to be maintained. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107, 118 S.Ct. 1003, 1019 (1998) (holding that the costs of investigating and prosecuting a substantive claim do not give rise to standing to assert the claim); *Lewis v. Cont'l. Bank Corp.*, 494 U.S. 472, 480, 110 S.Ct. 1249 (1990).

In *Steel Co.*, the Supreme Court made this clear, stating "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An interest in attorney's fees is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." In *Lewis*, the Supreme Court definitively held that the *possibility* that attorneys' fees under Section 1988[3] may be awarded does not "create an Article III case or controversy where none exists on the merits of the underlying claim . . ." *Lewis*, 494 U.S. at 480-81, 110 S.Ct. at 1255.

---

3. Courts have held that the IDEA's fee-shifting provisions are intended to be interpreted in consonance with Section 1988 and other federal civil-right fee-shifting statutes. *A.R. ex. rel. R.V. v. N.Y. City Dep't. of Educ.*, 407 F.3d 65, 73, n.9 (2nd Cir. 2005); *Doe v. Bd. of Educ.*, 165 F.3d 260, 264 (4th Cir. 1998).

E. R.R.'s argument, if accepted, would violate the Spending Clause.

R.R.'s argument asks the Court to create a new standard of liability for fees under the IDEA, which would impermissibly infringe upon the sovereign immunity held by EPISD. The IDEA is not simply a fee-shifting statute; it is a waiver by the government of its sovereign immunity. Accordingly, any waiver of sovereign immunity must be strictly construed in favor of the governmental entity. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135, 112 S.Ct. 515, 520 (1991). The Supreme Court recognizes that "[l]ike a waiver of immunity itself, which must be unequivocally expressed . . . this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 160-61, 101 S.Ct. 2698, 2701-02 (1981). A waiver of sovereign immunity must therefore be unequivocally expressed, with all uncertainties resolved in favor of the governmental entity. *Boehms v. Crowell*, 139 F.3d 452, 463 (5th Cir. 1998). The Supreme Court acknowledged the limited nature of the waiver of sovereign immunity under the IDEA, ruling that a waiver of immunity under the IDEA must be made knowingly, such that any conditions imposed upon a governmental entity be unambiguous. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 294-304, 126 S.Ct. 2455, 2459-2464 (2006).

The IDEA was enacted by Congress pursuant to the Spending Clause. U.S. CONST., ART. I, § 8, CL. 1; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

To confer an absolute right upon a party to continue with litigation solely to create a claim for attorneys' fees would violate the Spending Clause of the United States Constitution. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464 (2006). In *Murphy*, the Supreme Court held that since the IDEA was enacted pursuant to the Spending Clause, any conditions imposed upon the acceptance of federal funds must be spelled out unambiguously and that States could not be held to knowingly accept conditions of which they were unaware or unable to ascertain. *Murphy*, 548 U.S. at 296, 126 S.Ct. at 2459. The central inquiry for the *Murphy* Court was whether the IDEA furnished a state official deciding whether to accept IDEA funds with notice that one of the obligations imposed upon such acceptance would be the obligation to compensate prevailing parties for expert fees. *Id.* In *Murphy*, the Supreme Court rejected the argument that expert fees should be interpreted to be part of the costs that could be recovered under 20 U.S.C. §1415(i)(3)(B), concluding that neither the plain language of the IDEA, nor the Court's previous rulings on the meaning of the term "costs" could provide the clear notice required to attach such a condition to the receipt of IDEA funds. *Murphy*, 548 U.S. at 294-304, 126 S.Ct. at 2459-2464. Neither state nor federal law notifies school districts that a condition of accepting federal funds under the IDEA includes the obligation to be strictly liable for the payment of attorneys' fees, even under circumstances when it has not refused the parent's requested relief, and has offered to provide such without the need for any litigation. Nothing within the IDEA notifies school districts that a statutory right to attorneys' fees inherently exists as R.R. asserts.

Supreme Court review is not necessary in this case. The Fifth Circuit correctly ruled that R.R. should be denied fees because he was offered all educational relief and reasonable attorneys' fees, leaving absolutely no need to continue litigating. (Pet. 24a). The Fifth Circuit did not deny R.R. any rights guaranteed under the IDEA, and the policy arguments espoused by R.R. are singularly left to Congress to consider. In the absence of any action from Congress to eliminate "prevailing party" status as an element to fee eligibility under the IDEA, or to otherwise amend the IDEA and make a party strictly liable for a mandatory fee award under the IDEA, courts are simply not authorized to accept the arguments offered by R.R. here. However, even if they were, this is not the case for such discussion, as the denial of fees was not based on an application of *Buckhannon*, or even a determination that a parent can be forced to accept a settlement agreement and forgo attorneys' fees under the IDEA as R.R. falsely implies. The Fifth Circuit's reversal of the district court's award was based on direct application of the IDEA's statutory provisions, 20 U.S.C. § 1415(i)(3)(D) and 20 U.S.C. § 1415(i)(3)(F), which permit reduction or denial of fees when a parent receives no more relief than offered or is found to have engaged in unreasonable protraction. The petition for writ of certiorari should be denied.

II. THE FIFTH CIRCUIT WAS NOT WRONG IN FINDING THAT R.R. ENGAGED IN UNREASONABLE PROTRACTION AND RECEIVED NO MORE RELIEF THAN OFFERED BY EPISD.

R.R. argues, without citation to any facts or law, that the Fifth Circuit did not require EPISD to prove that its offer was more relief than he received. (Pet. 18-19). The facts dispel this erroneous statement. The Fifth Circuit acknowledged that EPISD had contended that it had offered R.R. all relief requested before litigation. (Pet. 9a). The Fifth Circuit examined the evidence in the record before it and found that "EPISD offered R.R. all of his requested educational relief at the resolution meeting." (Pet. 20a). R.R. did not even dispute this below;[4] as shown by the Fifth Circuit's finding that "it is undisputed that R.R. did not achieve any educational benefits beyond what EPISD offered." (Pet. 16a). However, the Fifth Circuit did not stop there, as R.R. falsely states in arguing that the Fifth Circuit created a new standard that would have denied him rightful attorneys' fees. (Pet. 18-19). The Fifth Circuit noted at the outset of its decision that R.R. rejected a settlement offer that included all the educational relief that he requested and reasonable attorneys' fees. (Pet. 2a). The Fifth Circuit further found that EPISD "wisely included the payment of reasonable attorney's fees to R.R. as part of its settlement offer. Consequently, R.R. was offered all requested educational relief *and* reasonable

4. R.R.'s failure to raise this issue before the Fifth Circuit bars him from raising it now. *Ellis*, 349 U.S. at 460, 75 S.Ct. at 852.

attorney's fees, leaving absolutely no need to continue litigating." (Pet. 24a) (emphasis in original).

The Fifth Circuit went on to state, "[i]nstead R.R. and his attorney walked out of the resolution meeting, continued litigation, and unreasonably protracted the resolution of the dispute for over three years." (Pet. 24a). R.R. does not even attempt to address these facts, much less show any error in them that would provide a compelling reason for Supreme Court review. In fact, R.R. altogether ignores the central basis for the vacatur of his fee award, failing to even cite to 20 U.S.C. § 1415(i)(3)(i)(F) at any point in his petition.

R.R. offers no citation to any facts or authority to show that the Fifth Circuit's factual findings here were obviously and exceptionally erroneous or plainly without support such that Supreme Court review is compelled. Furthermore, R.R.'s assertion of error, even if assumed to be true, is insufficient grounds for the exercise of the Supreme Court's discretionary review. Review depends on numerous factors other than the perceived correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437, 2447 (1974). The Supreme Court Rules confirm that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. The Supreme Court therefore does not undertake to review findings of fact, in the absence of a very obvious and exceptional showing of error. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 670, 87 S.Ct. 666, 670 (1967). It is long settled that the Supreme Court will not grant a

petition for writ of certiorari to review a decision on the grounds that the evidence was not sufficient to support the decision. *Southern Power Co. v. North Carolina Pub. Servs. Co.*, 263 U.S. 508, 509, 44 S.Ct. 164, 165 (1924). It is not warranted to grant a writ of certiorari to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-89, 58 S.Ct. 849, 851 (1938). Here, R.R. has at best only established his personal disagreement with the Fifth Circuit's findings, but completely fails to show how these factual findings constitute exceptional error of such importance to warrant Supreme Court review. The petition for writ of certiorari should be denied.

III. THE FIFTH CIRCUIT WAS NOT WRONG TO DETERMINE THAT R.R. WAS NOT SUBSTANTIALLY JUSTIFIED IN REJECTING EPISD'S SETTLEMENT OFFERS BASED ON ENFORCEABILITY CONCERNS.

A. The IDEA directly allows enforcement of settlement agreements in state or federal court.

R.R. erroneously claims that without a consent decree, he could not support enforcement by contempt[5]

---

5. In making this argument, R.R. faults the Fifth Circuit, stating "it does not mention the Eighth Circuit's ruling in *Christina A.* that contempt is not available to enforce a private settlement. . ." (Pet. 23). R.R. fails however to inform the Supreme Court that he never raised this argument with the Fifth Circuit. The Supreme Court does not decide in the first instance issues not decided below; questions which may lurk in the record, but which are not brought to the attention of the

(Cont'd)

and therefore could only have attempted to enforce EPISD's settlement offer under contract law, to which he alleges EPISD was immune under Texas law. (Pet. 22-23). R.R. claims that the Fifth Circuit's decision therefore conflicts with Texas law. However, whether or not R.R. could bring a breach of contract claim against EPISD is irrelevant. R.R. offers absolutely no legal authority to establish that he could not have enforced a settlement agreement in state or federal court *under the IDEA*. Instead, R.R. seems to argues that because he could not sue EPISD for a breach of contract action in state court, the Fifth Circuit's decision must be in error. R.R.'s argument erroneously assumes both that the IDEA cannot provide a remedy exclusive of any state contract actions that might exist, and that state law can overrule the IDEA.

R.R. also fails to inform the Court that the Fifth Circuit expressly refrained from weighing upon whether R.R. could have enforced a settlement agreement under state law, instead limiting its holding to a determination that a settlement agreement reached at the resolution meeting would have been enforceable in federal court pursuant to 20 U.S.C. § 1415(f)(1)(B)(iii). (Pet. 17a).

R.R.'s alleged concerns regarding enforceability and immunity is easily dispelled by the unambiguous text of the IDEA. Nothing within the IDEA contemplates

---

(Cont'd)
court nor ruled upon are not considered to have been decided as to constitute precedents that would warrant review. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169, 125 S.Ct. 577, 585 (2004).

consent decrees or judicial approval of disputes resolved by settlement. 20 U.S.C. § 1400 *et. seq.* Rather, the IDEA unequivocally provides that a party may resolve their dispute with a written settlement agreement, which is enforceable in state *or* federal court. 20 U.S.C. § 1415(f)(1)(B)(iii). The IDEA therefore unmistakably waives immunity against an action seeking enforcement of a written settlement agreement, making it "enforceable in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(f)(1)(B)(iii)(II). *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972 (2003) (holding that Congress made its intention to abrogate immunity unmistakably clear in the language of the FMLA, enabling employees to sue employers "in any Federal or State court of competent jurisdiction."). The Fifth Circuit noted that R.R.'s counsel even admitted that a settlement agreement reached at a resolution meeting would have been enforceable. (Pet. 21a).

R.R. cites to Chapter 271 of the Texas Local Government Code, as well as Texas Supreme Court decisions in *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008) and *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) to argue that EPISD would be immune from any enforcement of a settlement agreement entered under the IDEA. Neither Chapter 271 nor the Texas Supreme Court decisions R.R. relies upon involve IDEA disputes, or settlement agreements resolving IDEA claims. These authorities do not displace 20 U.S.C. § 1415(f)(1)(B)(iii)(II). At best, R.R. has only proven that he cannot use Chapter 271 of the Texas Local Government Code to attack EPISD if it failed to comply with a settlement agreement resolving an IDEA

claim. That Chapter 271 of the Texas Local Government Code may not be available as a remedy does not undermine the remedy created by Congress under the IDEA. Chapter 271 of the Texas Local Government Code is not the only waiver of immunity that can be created by a legislative body. The IDEA provides its own remedy, which is untouched by Chapter 271. The petition for writ of certiorari should be denied.

B. The Supremacy Clause does not permit state law to trump the IDEA.

Even assuming that R.R.'s interpretations of Texas law were correct, state law cannot supersede application of the IDEA and Section 1415(f)(1)(B)(iii)(II). The Supreme Court recognizes that Congress may abrogate the States' Eleventh Amendment immunity when "it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 121 S.Ct. 955, 962 (2001). In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666 (1976), the Supreme Court held that "the Eleventh Amendment, and the principal of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." As a result, the Supreme Court has concluded that Congress has the power to abrogate state sovereign immunity and subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power. *Garrett*, 531 U.S. at 364, 121 S.Ct. at 962; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56-57, 116 S.Ct. 1114, 1123-1124 (1996).

In *Fitzpatrick*, the Supreme Court recognized:

> The Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to [Section] 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. 427 U.S. at 456, 96 S.Ct. at 2671. (internal citations omitted); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 279, 117 S.Ct. 2028, 2039 (1997) (explaining that a state is not immune from claim for damages under federal Title VII because Congress can abrogate Eleventh Amendment immunity when exercising remedial powers under section 5 of the Fourteenth Amendment).

Any state sovereign immunity that might arguably exist can be waived by voluntary consent, in consideration for receipt of federal funds. *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793 (1987) (stating that the Federal government does not lack the authority or means to seek the States' voluntary consent to private suits); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53, 64 S.Ct. 873 (1944) (acknowledging that the rigors of sovereign immunity are "mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign."). In enacting the IDEA, Congress did just that, abrogating a State's sovereign immunity by consent as a condition to federal funding. 20 U.S.C. § 1403.

The Texas authority cited by R.R. cannot be read to conflict with or otherwise infringe upon the valid waiver of immunity under the IDEA. The Supreme Court recently stated in *Haywood v. Drown*, __ U.S. __, 129 S.Ct. 2108 (2009):

> [F]ederal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Id. at 2114, citing *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876); The Federalist No. 82, p. 132 (E. Bourne ed. 1947) (A. Hamilton).

State courts, as well as federal courts are entrusted with providing a forum for the vindication of federal rights such that there is a presumption of concurrency that is defeated only under narrow circumstances that do not exist in the case at bar. *Id.*; *see also Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 506-507, 102 S.Ct. 2557 (1982); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 222, 36 S.Ct. 595 (1916). Here, the IDEA expressly confirms concurrency, allowing enforcement of settlement agreements in state or federal court. 20 U.S.C. § 1415(f)(1)(B)(iii)(II).

The Supremacy Clause prohibits state law from superseding federal law. The Supremacy Clause mandates, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. ART. VI.

The Supreme Court's decision in *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430 (1990) is directly on point here and dispositive. In *Howlett*, the Supreme Court considered the question of whether a Florida school board could assert a state-law immunity defense in a § 1983 action brought in state court when the defense would not have been available if the action had been brought in federal court. The Supreme Court unanimously held that the State's decision to extend immunity "over and above that which is already provided in § 1983 . . . directly violates federal law," and explained

that the "elements of, and the defenses to, a federal cause of action are defined by federal law. *Howlett*, 496 U.S. at 375, 110 S.Ct. 2430; *Owen v. Independence*, 445 U.S. 622, 647, n. 30, 100 S.Ct. 1398 (1980).

In *Howlett*, the Supreme Court explained:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum-although both might well be true-but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. *Howlett*, 496 U.S. at 367, 110 S.Ct. 2430.

To accept R.R.'s contention here would therefore require adopting an interpretation that would violate the Supremacy Clause. *Haywood*, 129 S.Ct. at 2115 (holding that if state law was understood as offering an immunity defense, *Howlett* would compel the conclusion that it violates the Supremacy Clause); *see also Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58, 32 S.Ct. 169 (1912) (rejecting state of Connecticut's refusal to recognize the Federal Employer's Liability Act, and holding that a state court could not deny a federal right absent some valid excuse because the "existence of the jurisdiction creates an implication of the duty to exercise

it."); *Testa v. Katt*, 330 U.S. 386, 394, 67 S.Ct. 810, 815 (1947) (holding that state court could not decline to exercise jurisdiction by refusing to enforce federal law, the Emergency Price Control Act). The petition for writ of certiorari should be denied.

C. It is not even settled under Texas law that EPISD would be immune from a breach of contract action arising from an alleged breach of a settlement reached under the IDEA.

R.R. fails to acknowledge that the Texas Supreme Court has not definitively determined that a governmental entity entering into a settlement agreement resolving a claim for which immunity was waived would be protected by immunity for a subsequent action for breach of that settlement agreement. To the contrary, the Texas Supreme Court held, in a plurality opinion, that when a governmental entity enters into a settlement agreement stemming from a lawsuit where immunity from suit has been waived, the waiver will extend to the separate settlement agreement contract. *Texas A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002).

The *Lawson* exception to sovereign immunity for breach of contract actions was not affected by the Texas Supreme Court's decision in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006).[6] The Texas Supreme Court's

6. R.R.'s citation to the Supreme Court's decision in *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008) is irrelevant as it did not involve any discussion of (Cont'd)

decision in *City of Houston v. Jones*, 197 S.W.3d 391 (Tex. 2006), rendered on the same day as its decision in *Tooke* made clear that *Lawson* remained good law. In *Jones*, the Texas Supreme Court remanded a suit for breach of a settlement agreement relating to tort claims against the city, instructing the lower court to consider not only whether Chapter 271 of the Local Government Code waived immunity, but *also* whether the City lacked immunity under *Lawson*. *Jones*, 197 S.W.3d at 391. If the Texas Supreme Court intended to signify that its previous holding in *Lawson* was overruled by *Tooke*, it would have said so expressly, and certainly would not have rendered its decision in *Jones* with the instruction for the lower court to also consider whether the city lacked immunity under *Lawson*. R.R. cannot therefore even establish that Texas law is as definitive as he suggests in his attempt to show that a conflict actually exists between state law and the Fifth Circuit's decision. What is certain is that to accept R.R.'s interpretation of state law would require one to disregard both the Supremacy Clause and the direct remedy provided under the IDEA. The petition for writ of certiorari should be denied.[7]

(Cont'd)
immunity for contract actions, but instead involved a waiver of immunity under the Texas Torts Claim Act and Texas Labor Code. *Id.* at 655-661.

7. Additionally, the Supreme Court generally does not grant certiorari based upon claims that a court of appeals has decided a question in conflict with state law. The Supreme Court codified this longstanding abstention in 1980, eliminating it as a reason for review. *Compare* U.S. Sup. Ct. R. 19(1)(b) (1970) with U.S. Sup. Ct. R. 17.1 (1980); 398 U.S. 1030, 1031; 445 U.S. 1003.

IV. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE IDEA'S PURPOSES.

R.R. seeks to frame the Fifth Circuit's decision as inconsistent with the purposes of the IDEA, and therefore involving an exceptionally important issue that warrants Supreme Court review. In making this argument, R.R. fails to address the fact that EPISD offered him not only all educational relief, but also reasonable attorneys' fees. (Pet. 2a, 24a). In light of these facts, R.R. cannot credibly point to anything in the IDEA that would indicate that it was intended to allow a party to choose protracted litigation and delay of the provision of educational services for the child over prompt a settlement providing all relief.

The U.S. Supreme Court in *Schaffer* recognized that "Congress has repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Schaffer*, 129 S.Ct. at 535. In enacting the IDEA, Congress stated that "parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways." 20 U.S.C. § 1400(c)(8). The IDEA is intended to promote quick and effective resolution of disputes to assure students' needs are met as soon as possible. The statutory text of the IDEA itself demonstrates a strong commitment to identify whether a dispute even actually exists, encourage resolution, and bar litigation for its own sake. *See* 20 U.S.C. § 1400(c)(8); 20 U.S.C. §§ 1415 (c), (d), (e), (f); 20 U.S.C. § 1415(i)(3)(D); 20 U.S.C. § 1415(i)(3)(F); 20 U.S.C. § 1415(i)(3)(G). The Act, and its recent amendments in 2004 promote early resolution of disputes to achieve their overriding purpose of

ensuring the provision of a FAPE to students with disabilities. The IDEA requires parents to exhaust administrative remedies, including giving schools notice and the opportunity to cure and resolve disputes. 20 U.S.C. §§ 1415 (c), (e), (f), (i). The specific due process complaint notice requirements, 20 U.S.C. §1415(c)(2)(A), local educational agency response requirements including prior written notice, 20 U.S.C. §1415(c)(2)(B), amended complaint requirements, 20 U.S.C. § 1415(c)(2)(E), and preliminary meeting requirements, 20 U.S.C. § 1415(f)(1)(B)(i), provide the framework for a school district to be able to resolve a due process complaint.

The IDEA suspends the commencement of the timelines for a due process hearing for thirty days to provide the school the opportunity to resolve a complaint without the need for a hearing. 20 U.S.C. § 1415(f)(1)(B)(ii). The IDEA added an additional exhaustion requirement in 2004, set forth in 20 U.S.C. §1415(f)(1)(A), which clearly states, "a due process hearing may occur" only "if the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint. . ."

The IDEA also requires that within fifteen days after the filing of a due process hearing, the parties must convene at a preliminary resolution meeting, and the parent must engage in a discussion of the due process complaint, and the facts that form the basis of the due process complaint to give the school district the opportunity to resolve the dispute forming the basis for the due process complaint. 20 U.S.C. § 1415(f)(1)(B)(iv) and 34 C.F.R. § 300.510(a)(2).

The purpose of these IDEA exhaustion procedures established by Congress is to avoid unnecessary judicial decisions by giving the educational agency an opportunity to correct errors. *See* S. REP. No. 108-185 (2003); *Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 724 (10th Cir. 1996); *N.B. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). In fact, the Senate Report on the 2004 amendments repeatedly emphasized the hope that judicial intervention would be avoided, stating: (i) the notice requirement was assumed to "give school districts adequate notice to be able to defend their actions at due process hearing, or even to resolve the dispute without having to go to due process;" (ii) "the committee is hopeful that such a written response from the school may, in fact, help a parent to resolve a disagreement, and eliminate the need to proceed to a due process hearing;" and (iii)

> the committee believes that the parents should have a forum to resolve matters in a more informal way before moving to a more adversarial process. The bill adds a new provision, section (f)(1)(B) to provide this forum . . . [t]he committee does not intend that either party would have the right to refuse to participate in the resolution session.

S. REP. No. 108-185 (2003).

To ensure that its purposes are met, the IDEA includes provisions that permit the reduction or denial of attorneys' fees, and awards fees to school districts against attorneys who continue to litigate after the litigation becomes frivolous, unreasonable or without

foundation. 20 U.S.C. § 1415(i)(3)(D); 20 U.S.C. § 1415(i)(3)(F)(i); 20 U.S.C. § 1415(i)(3)(B)(i)(II). In light of R.R.'s conduct here, the Fifth Circuit straightforwardly applied these two fee-shifting provisions to correctly determine that the district court's fee award to R.R. should be vacated. R.R. does not provide any compelling reason that would warrant Supreme Court review.

The purposes of the IDEA were unquestionably furthered by the Fifth Circuit's decision. The IDEA's purpose is not to promote the self-interests of a parent's attorney over that of his client's child. The IDEA is not intended to permit litigation for litigation's sake. The IDEA is not intended to permit a party to refuse an offer of all educational relief and reasonable attorneys' fees to continue absolutely needless litigation for over three years. (Pet. 2a, 24a). To permit a party who has engaged in this pattern of conduct to be awarded with self-incurred and unnecessary attorneys' fees would transform the IDEA from the shield of children with disabilities into the sword of attorneys seeking to harm a school district and create an action for fees that does not exist under *Buckhannon*.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOE R. TANGUMA II
Counsel of Record
ELENA M. GALLEGOS
WALSH, ANDERSON, BROWN,
GALLEGOS & GREEN, P.C.
P.O. Box 168046
Irving, Texas 75016
(214) 574-8800
jtanguma@irv.wabsa.com
Attorneys for Respondent